TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 199.

S. JENNISON, EXECUTOR OF B. B. TITCOMB, PLAINTIFF IN ERROR,

vs.

J. T. KIRK.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

FILED OCTOBER 7, 1876.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the justices of the supreme court of the State of California, greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said supreme court, before you, between S. Jennison, executor of the estate of B. B. Titcomb, deceased, plaintiff in error, and J. T. Kirk, defendant in error, a manifest error happened, to the great damage of the said plaintiff in error, as by his complaint appears, and it being fit that the error, if any there hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States of America, together with this writ, so that you have the same at the city of Washington, in the District of Columbia, on the second Monday of October next, in the said United States Supreme Court to be there and then held, that the record and proceedings aforesaid be inspected, the said United States Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 25th day of May, in the year of our Lord one thousand eight hundred and seventy-six, and of the Independence of the United States the 100th.

Attest, &c.:

[SEAL.]

L. S. B. SAWYER,
Clerk of U. S. Circuit Court Cal.,
By J. F. O'BEIRNE,
Dep. Clk.

The above writ of error is hereby allowed.

W'M T. WALLACE,
Chief Justice of the Supreme Court State of California.

(Indorsed:) United States Supreme court. S. Jennison, executor, &c., pl'ff in error, vs. J. T. Kirk, def't in error. Writ of error.

Copy of this writ lodged in the office of the clerk of supreme court of California this 30th of May, 1876.

D. B. WOOLF, *Clerk*,
By H. P. BUSH, *Deputy.*

2 UNITED STATES OF AMERICA, *ss:*

To J. T. Kirk, defendant in error, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States of America to be held at the city of Washington, in the District of Columbia, on the second Monday of October, A. D. 1876, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of California, wherein S. Jennison, executor of the estate of B. B. Titcomb, deceased, is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the honorable William T. Wallace, chief justice of the su-

preme court of the State of California, this twenty-ninth day of May, A. D. 1876, and of the Independence of the United States the 100th.

[SEAL.] WM T. WALLACE,
Chief Justice of the Supreme Court of the State of California.

(Indorsed:) United States Supreme Court. S. Jennison, executor of estate of B. B. Titcomb, dec'd, pl'ff in error, vs. J. T. Kirk, def't in error. Citation. Filed June 15th, 1876. D. B. Woolf, clerk.

2½ STATE OF CALIFORNIA,
County of Placer, ss:

W. H. Fulweiler, being duly sworn, deposes and says, that he is a white male citizen of the United States over the age of twenty-one years, not interested in said action, and capable of being a witness therein; that he served the within citation upon the defendant in error, J. T. Kirk, personally, by delivering to him a true and exact copy thereof on the 12th day of June, 1876, at Auburn, county of Placer, State of California.

W. H. FULWEILER.

Sworn and subscribed to before me this 12th day of June, 1876.
Subscribed and sworn before me this 12 June, 1876.

[SEAL.] J. R. CRANDALL,
County Clerk, Placer County, Cal'a.

3 In the supreme court of the State of California.

TRANSCRIPT ON APPEAL.

Complaint.

In district court, fourteenth judicial district, State of California, county of Placer.

B. B. TITCOMB, PLAINTIFF,
vs.
J. T. KIRK, DEFENDANT.

The plaintiff complains of defendant and alleges the following facts, constituting his cause of action:

That about the first of August, 1873, he commenced the construction of a water ditch leading from the south fork of Shirt Tail Cañon to Georgia Hill, all in said county, and completed the same about the first of December, 1873, at a cost of about $18,000.

That he so constructed said ditch for the purpose of conveying the waters of said cañon, tributaries, and intermediate streams to said Georgia Hill and intermediate and other localities for mining, milling, and agricultural purposes, and for sale for such purposes, and, immediately upon the completion of the ditch, turned said waters therein and actually appropriated the same.

That said ditch is about 5 feet in width at the top, 3 feet on the bottom, and 2½ feet deep below the grade; has a grade of $12\frac{80}{100}$
4 feet to the mile; is about 17 miles in length, and of capacity to carry 1,000 inches of water.

That there is naturally water enough flowing in said Shirt Tail Cañon, and in said tributaries and intermediate streams, and which will naturally flow into said ditch, to receive 1,000 inches of water therein during

the wet or rainy seasons of the year, and not less than about 100 inches during the dry seasons.

That at or about the time of the commencement of the construction of the ditch plaintiff posted a notice in writing at a conspicuous place at the head of the ditch, stating therein that he claimed said waters to the extent of 2,000 inches for the purposes and at the places aforesaid, and that he intended to divert the same by means of a flume and ditch of the dimensions aforesaid, and within ten days thereafter had said notice recorded in the office of the recorder of said county and the work of the construction of the ditch commenced and progressing.

That the lands over which said ditch runs is, and was at the time of of its construction, public land of the United States, not reserved for public uses; that plaintiff is a native-born citizen of the United States, and that by the act of Congress entitled "An act granting the right of way to ditch and canal owners over the public lands, and for other purposes," approved July 26, 1866, and an act amendatory thereof, approved July 9, 1870, the rights of way over said lands for the construction of said ditch was granted and acquired by plaintiff.

That the plaintiff now is, and ever since the commencement and completion of said ditch has been, the owner, and actually possessed thereof, and entitled to possess and use the same, together with said
5 waters aforesaid, without hindrance or molestation.

That there now is, and ever since the completion of said ditch there has been, a ready market for the sale of all the water said ditch can carry, at nine cents an inch, for the purposes aforesaid, and from 500 to 600 inches of water that would naturally flow into it, and which would now flow therein and be sold and disposed of by the plaintiff for the purposes aforesaid, but for this, that the defendant, without right and against the consent of the plaintiff, on or about the 17th day of November, 1873, entered upon said ditch at a point about four or five miles from its head, and about 150 yards east of his (defendant's) house, and about 25 feet northward of a sag or gulch, known as Fulweiler's Gulch or Cañon, and then and there made a cut or excavation across said ditch large and deep enough to let out and escape all the water the ditch would carry, and thenceforth threatened and still threatens to so cut and injure said ditch at pleasure, and to wash away, break and injure the same, the result of which is that the plaintiff will be wholly deprived of the use of his said property, unless the defendant be restrained from the commission of his said threatened wrongs and injuries.

And the plaintiff says, that by reason of the wrongs and injuries of defendant as aforesaid, he has already sustained damages in the sum of about $500, and that his loss will be about $100 each day that he is deprived of the uninterrupted use of his said property, and that he cannot use the same to advantage under the threats of the defendant, as aforesaid, nor fulfil his contracts for the supply of
6 water for the purposes aforesaid.

Wherefore, and by reason of the premises, plaintiff prays judgment against defendant for the sum of $500 and costs, and that until the determination of this cause the defendant, his agents and employees be restrained and enjoined from the commission or continuance of the wrongs and injuries aforesaid, and from interfering with said ditch property or its uses, and that upon the final trial, such injunctions be made perpetual, and that the plaintiff be granted such other and further relief as may be just and equitable.

MYERS & FELLOWS,
Attorneys of Plaintiff.

STATE OF CALIFORNIA,
County of Placer, ss:

T. G. Durning, being duly sworn, on his oath says that he has heard read the foregoing complaint and knows its contents, and that the same is true of his own knowledge, except as to the matters which are therein stated on his information or belief, and as to those matters he believes it to be true; that he is the attorney in fact of the plaintiff, and the facts within affiant's knowledge, and that the plaintiff is absent from the State of California.

P. G. DURNING.

Subscribed and sworn to before me this 7th day of January, 1874.
B. F. BURT,
County Clerk.

(Indorsed:) Filed January 7th, 1874. B. F. Burt, clerk.

7 *Answer.*

Title of court and cause.

Now, by attorney, comes the above-named defendant, and for answer to plaintiff's complaint herein, denies that said plaintiff completed the ditch mentioned in said complaint, on or about the first day of December, A. D. 1873, or at any time prior to the 19th day of said December, 1873.

Defendant denies that upon the completion of said ditch plaintiff turned therein or appropriated all the waters mentioned in said complaint, or that he then or ever by the means described or otherwise turned therein or appropriated all or any of the waters of the streams mentioned in said complaint, and therein designated as Fulweiler's Gulch; and defendant avers that long prior to the said commencement of said ditch by plaintiff, he, the said defendant, had actually, lawfully and fully appropriated the waters of said last-named stream for mining and agricultural purposes, as hereinafter more specifically averred and set forth.

Defendant denies that under or by virtue of any act or acts of Congress of the United States, or otherwise, said plaintiff was granted or acquired the right of way for the construction of said ditch over that portion of the lands traversed by said ditch constituting the mining claims of said defendant and hereinafter described; or that plaintiff acquired or was granted by the means aforesaid, or otherwise, the right of way for the construction of said ditch over any portion
8 of said mining claims of defendant; and defendant denies that said plaintiff now is or ever was the owner of or possessed of or entitled to possess or use without hindrance or molestation, the said portion of said ditch on said defendant's said claim, or the waters therein.

Defendant denies that at the time of the commencement of this action there was, or at any time prior thereto there had been, from five hundred to six hundred inches of water, or any quantity greater than about 250 inches, which, but for the alleged acts of defendant, or otherwise would have flowed into said ditch, and defendant denies that the same or any of the same could have been sold or disposed of by plaintiff; and on the contrary, defendant avers that about the 16th day of December, 1873, a considerable portion of the fluming on the line of and constituting a part of said ditch was washed away and broken

down at a point about one mile below the head of said ditch, and that by reason of said breaking down of said flume it became and was impossible to cause any water to flow through said ditch until the same was repaired and replaced and that the same was not so repaired or replaced until the 24th day of said December, 1873; and defendant avers that on the 1st day of January, A. D. 1874, the said portion of the said flume was again broken and washed down, rendering the same and said ditch incapable of conveying said or any waters, and so remained until the 7th day of January, A. D. 1874.

And defendant further avers that prior to and on the 22nd day of December, 1873, at a point about one mile by the line of said ditch above the point where the same is alleged to have been cut by defendant, the said ditch was filled up and closed by the upper bank thereof falling and sliding into said ditch, and said ditch was, by the means aforesaid, blocked up for about the distance of one quarter of a mile, and was rendered incapable of conveying said waters or any of them, and so remained blocked up until about the 8th day of January, 1874.

And defendant avers that plaintiff and his employees, on the 2nd day of said day of said January, 1874, filled up and repaired the said cut in said ditch made by defendant, and the same has so continued filled up and repaired from thence to the present time.

Defendant denies that his alleged cutting of said plaintiff's ditch at the point mentioned in said complaint was done without right; but, on the contrary, avers that said act was rightful, needful and proper, and done in the assertion and maintenance of defendant's rights to have his said waters of said gulch, described in said complaint as Fulweiler's Gulch, flow into and along through one of defendant's ditches into defendant's reservoir, situated below plaintiff's said ditch, and which said ditch of defendant had been by plaintiff wrongfully and unlawfully and without defendant's consent, cut, obstructed, and destroyed at the point mentioned in said complaint, and defendant avers that in doing of the acts complained of, he only repaired, reopened, and maintained his own said ditch, as he lawfully might; and defendant denies that he has ever threatened or still threatens so to cut said ditch at pleasure, except to the extent necessary and proper to enable him to keep his said waters of said gulch flowing into and through his said ditch and ditches, by him constructed, kept, maintained and used long prior to the construction of said plaintiff's ditch.

Defendant denies that by reason of the acts alleged in said complaint, or any of them, the said plaintiff has sustained damages in the sum of five hundred dollars or in any other sum, or that he will or would, by reason of any act or acts of defendant done or threatened, suffer the further loss of $100 or any other sum per day. And for other and further answer and defense herein, defendant avers that for more than twenty years last past, defendant and his grantors and predecessors in interest have been, and defendant still is, in the lawful and actual possession of that portion of that certain gulch, described in said complaint as Fulweiler's Gulch (but which, in fact, is and for more than two years last past has been commonly known as Kirk's Gulch, and for many years before had been commonly known as the Mount Pleasant Gulch), commencing at a point thereon where the old Union Ditch crosses the same, said point being about twelve hundred feet below the crossing thereof by said ditch mentioned in said complaint, and extending up said gulch to a point thereon where the miner's ditch crosses the same (said point being about twelve hundred feet above the crossing

STATE OF CALIFORNIA,
County of Placer, ss:

T. G. Durning, being duly sworn, on his oath says that he has heard read the foregoing complaint and knows its contents, and that the same is true of his own knowledge, except as to the matters which are therein stated on his information or belief, and as to those matters he believes it to be true; that he is the attorney in fact of the plaintiff, and the facts within affiant's knowledge, and that the plaintiff is absent from the State of California.

P. G. DURNING.

Subscribed and sworn to before me this 7th day of January, 1874.
B. F. BURT,
County Clerk.

(Indorsed:) Filed January 7th, 1874. B. F. Burt, clerk.

7 *Answer.*

Title of court and cause.

Now, by attorney, comes the above-named defendant, and for answer to plaintiff's complaint herein, denies that said plaintiff completed the ditch mentioned in said complaint, on or about the first day of December, A. D. 1873, or at any time prior to the 19th day of said December, 1873.

Defendant denies that upon the completion of said ditch plaintiff turned therein or appropriated all the waters mentioned in said complaint, or that he then or ever by the means described or otherwise turned therein or appropriated all or any of the waters of the streams mentioned in said complaint, and therein designated as Fulweiler's Gulch; and defendant avers that long prior to the said commencement of said ditch by plaintiff, he, the said defendant, had actually, lawfully and fully appropriated the waters of said last-named stream for mining and agricultural purposes, as hereinafter more specifically averred and set forth.

Defendant denies that under or by virtue of any act or acts of Congress of the United States, or otherwise, said plaintiff was granted or acquired the right of way for the construction of said ditch over that portion of the lands traversed by said ditch constituting the mining claims of said defendant and hereinafter described; or that plaintiff acquired or was granted by the means aforesaid, or otherwise, the right of way for the construction of said ditch over any portion
8 of said mining claims of defendant; and defendant denies that said plaintiff now is or ever was the owner of or possessed of or entitled to possess or use without hindrance or molestation, the said portion of said ditch on said defendant's said claim, or the waters therein.

Defendant denies that at the time of the commencement of this action there was, or at any time prior thereto there had been, from five hundred to six hundred inches of water, or any quantity greater than about 250 inches, which, but for the alleged acts of defendant, or otherwise would have flowed into said ditch, and defendant denies that the same or any of the same could have been sold or disposed of by plaintiff; and on the contrary, defendant avers that about the 16th day of December, 1873, a considerable portion of the fluming on the line of and constituting a part of said ditch was washed away and broken

down at a point about one mile below the head of said ditch, and that by reason of said breaking down of said flume it became and was impossible to cause any water to flow through said ditch until the same was repaired and replaced and that the same was not so repaired or replaced until the 24th day of said December, 1873; and defendant avers that on the 1st day of January, A. D. 1874, the said portion of the said flume was again broken and washed down, rendering the same and said ditch incapable of conveying said or any waters, and so remained until the 7th day of January, A. D. 1874.

And defendant further avers that prior to and on the 22nd day of December, 1873, at a point about one mile by the line of said ditch above the point where the same is alleged to have been cut by defendant, the said ditch was filled up and closed by the upper bank thereof falling and sliding into said ditch, and said ditch was, by the means aforesaid, blocked up for about the distance of one quarter of a mile, and was rendered incapable of conveying said waters or any of them, and so remained blocked up until about the 8th day of January, 1874.

And defendant avers that plaintiff and his employees, on the 2nd day of said day of said January, 1874, filled up and repaired the said cut in said ditch made by defendant, and the same has so continued filled up and repaired from thence to the present time.

Defendant denies that his alleged cutting of said plaintiff's ditch at the point mentioned in said complaint was done without right; but, on the contrary, avers that said act was rightful, needful and proper, and done in the assertion and maintenance of defendant's rights to have his said waters of said gulch, described in said complaint as Fulweiler's Gulch, flow into and along through one of defendant's ditches into defendant's reservoir, situated below plaintiff's said ditch, and which said ditch of defendant had been by plaintiff wrongfully and unlawfully and without defendant's consent, cut, obstructed, and destroyed at the point mentioned in said complaint, and defendant avers that in doing of the acts complained of, he only repaired, reopened, and maintained his own said ditch, as he lawfully might; and defendant denies that he has ever threatened or still threatens so to cut said ditch at pleasure, except to the extent necessary and proper to enable him to keep his said waters of said gulch flowing into and through his said ditch and ditches, by him constructed, kept, maintained and used long prior to the construction of said plaintiff's ditch.

Defendant denies that by reason of the acts alleged in said complaint, or any of them, the said plaintiff has sustained damages in the sum of five hundred dollars or in any other sum, or that he will or would, by reason of any act or acts of defendant done or threatened, suffer the further loss of $100 or any other sum per day. And for other and further answer and defense herein, defendant avers that for more than twenty years last past, defendant and his grantors and predecessors in interest have been, and defendant still is, in the lawful and actual possession of that portion of that certain gulch, described in said complaint as Fulweiler's Gulch (but which, in fact, is and for more than two years last past has been commonly known as Kirk's Gulch, and for many years before had been commonly known as the Mount Pleasant Gulch), commencing at a point thereon where the old Union Ditch crosses the same, said point being about twelve hundred feet below the crossing thereof by said ditch mentioned in said complaint, and extending up said gulch to a point thereon where the miner's ditch crosses the same (said point being about twelve hundred feet above the crossing

thereof by said ditch mentioned in said complaint), and including the bed and banks of said gulch to the extent of fifty feet on each
11 side thereof throughout the said distance in said gulch, and have during all of said time held and worked the same for mining purposes, and as a mining claim in accordance with the laws, customs, rules, and usages of the mining district in which the same is situated, and that throughout all said time said defendant and his grantors and predecessors have been, and said defendant, long before the commencement of this action was, and still is, in the actual possession by means of ditches, reservoirs, etc., of all the waters of said gulch, and has during said time so held, possessed, used, and enjoyed the same for mining purposes and for agricultural purposes, and defendant avers that being so possessed of and entitled to possess said mining claim and said waters of said gulch, he had, long prior to the construction, survey, or location of said plaintiff's ditch, constructed a ditch to divert and convey, and by means thereof had actually diverted and conveyed, said waters from said gulch, and upon the northerly bank and side thereof and down along said side to and into a cut mined and made by said defendant, and thence to a reservoir made and constructed more than ten years ago for the collection and retaining said waters for mining purposes, and continuously since said construction thereof maintained and used by him to collect and retain said waters for said purposes, and that said plaintiff in the construction of his said ditch, without the consent of defendant and against his will, intersected and cut said defendant's said ditch at the point in said complaint described as about 25 feet northward of said gulch, and then and there cut and filled up defendant's said ditch, so that when the waters should come into
12 defendant's said ditch they would be diverted into and flow down plaintiff's said ditch and away from defendant's said claims and reservoir; and defendant avers that when said waters began to flow he opened his said ditch through plaintiff's said ditch at said point, as he lawfully might, so that said waters of defendant might and could flow through their accustomed channel and conduit across defendant's said claim and into said reservoir.

And defendant avers that he has by said means and to said extent, and for said purposes and none other, cut, broken, or obstructed the flow of water through said plaintiff's ditch.

And defendant further avers that long prior to the construction, survey, or location of said plaintiff's ditch, he was in the possession and use of certain other ditches, by him constructed and maintained and used to divert and convey said waters of said gulch across and along his said claims for convenient and advantageous use for mining and other purposes, and that said plaintiff in the construction of his said ditch did cut through, obstruct, and fill up the same, so that the said waters if allowed to flow therein would be diverted to said plaintiff's ditch, and carried away from defendant's said claims and control, and as to said ditches as well as said first-mentioned one, defendant avers that he has declared his intention and does intend except, while restrained by the injunction herein, to open the same and keep them open when and as required by him for his said mining and other uses to which said waters have by him been appropriated, and not otherwise.

13 And for other and further answer and defense herein defendant avers that for more than fifteen years last past he and his grantors and predecessors in interest have been the owners of and possessed of, and for more than ten years last past he has been the owner of and

possessed of those certain mining claims situated on and embracing said gulch, and having a western frontage of one thousand feet; said frontage being described as commencing at a stake standing on the southerly side of said gulch, and about four hundred and fifty feet westerly from the old Black Hawk claims, northwest corner, and extending across said gulch in a northerly direction one thousand feet to a stake; and said claims extending from said frontage on parallel lines in an easterly direction to said old Black Hawk, northwest corner; and along the Black Hawk north line to the center of the hill, said front line being about one thousand feet below the crossing of said gulch by plaintiff's said ditch, and said back line being more than fifteen hundred feet above the said crossing of said gulch by said ditch, said claims embracing about five hundred feet on each side of said gulch; and defendant avers that said claims are upon the public mineral lands of the United States and certain deposits of gold-bearing earth, gravel, etc., and are of great value for mining purposes. That defendant and his grantors and predecessors have during all the time aforesaid owned, held, possessed, and worked said claims in accordance with the laws, usages, and customs and regulations of the mining district where they are situated, and the laws of the State of California and the
14 United States; and that the defendant is a native born citizen of the United States; that in working and mining said claims and extracting said gold a reasonable, proper, and necessary method is the application of the hydraulic process by which said gold-bearing deposits of earth and gravel are washed down and removed by means of large quantities of water, and the gold contained therein separated from said earth and gravel, and is collected and washed and saved and realized. That while defendant was so in possession of and the owner of said claims the said plaintiff, without the consent of defendant and against his will, cut and constructed his said ditch upon, over, and across said claims, and into, through, and upon said gold-bearing earth and gravel; that defendant has been and is intending (except while restrained by the injunction issued herein) to proceed by said hydraulic process to mine and work said claims and extract said gold therefrom, and has declared his purpose to wash the same and so much of plaintiff's said ditch as is situated upon that portion of said claims necessary to be washed and mined in the reasonable, proper, and skillfull working of said claims; and defendant denies that he has ever intended or threatened or that he does intend to wash or break away or cut said ditch, except as hereinbefore stated.

And defendant avers that by the local customs, laws, rules, and regulations of the district within which are situated all his said ditches and mining claims and the said plaintiff's ditch, and by the decisions of the courts of this State and in consideration of his prior ownership and possession as hereinbefore stated, he has become and is vested
15 with the right as against said plaintiff to the exclusive possession, occupancy, and use of his said ditches and mining claims, and that by reason of defendant's said pr'ority of possession, occupancy, and use thereof, the said plaintiff hath not acquired or become vested with any right as against defendant to occupy or traverse the same with his said ditch, or to maintain his said ditch thereupon.

And defendant further avers that the location of said plaintiff's said ditch is such that it travers' the immediate front and margin of said deposit of said gold-bearing earth and gravel, and renders the same unaccessible from the cuts and outlets down said gulch, where the same will necessarily have to be washed and mined by said dydraulic process,

and that if said injunction be continued in force, and said ditch be maintained as constructed, defendant will be totally prevented from working and mining said claims as he desires, and as he of right should be permitted to do. And defendant avers that the construction and maintenance by plaintiff of that portion of his said ditch traversing defendant's said mining claims and ditches is an obstruction to defendant's free use of his said property, and materially interferes with defendant's enjoyment of his said property, and is a nuisance.

Wherefore defendant prays that said injunction issued herein be dissolved; that upon the final hearing of this cause it be decreed that he is entitled as against said plaintiff to the exclusive possession, occupancy, and use of his said mining claims and ditches; and that
16 plaintiff's said ditch situated on defendant's said claim be decreed to be a nuisance, and that the same be abated; and plaintiff, his agents, servants, and employees, and all and each of them, be enjoined from continuing or maintaining said portion of said ditch as aforesaid, and for his costs of suit herein, and for such other and further relief as he may be entitled to.

HALE & CRAIG,
Defendant's Attorneys.

STATE OF CALIFORNIA,
County of Placer, ss:

John T. Kirk, being first duly sworn, on oath says, that he is the defendant in the foregoing answer named; that he has heard read said answer, and knows the contents thereof; that the same is true of his own knowledge, except as to such matters as are therein stated on his information and belief, and as to those matters he believes it to be true.

his
JOHN + T. KIRK.
mark.

Subscribed and sworn to before me this seventeenth day of January, A. D. 1874.

R. C. POLAND,
Justice of Peace Township No. 3.

(Indorsed:)

Due service hereof accepted this nineteenth day of January, 1874.
MYERS & FELLOWS,
Attorneys for Plaintiff.

Filed January 19th, 1874.

B. F. BURT,
Clerk.

17 *Amended Complaint.*

(Title of court and cause.)

Now comes the plaintiff, and, by leave of court first obtained, files this supplementary complaint as an amendment and supplementary of his original complaint filed in this action, and for cause of action alleges:

1st. That since the filing of the original complaint in this action, the defendant's answer thereto and the dissolution of the injunction by this court, to wit, on or about the 30th or 31st day of January, 1874, the defendant, regardless of plaintiff's rights, washed away about forty feet in length of the plaintiff's said New Union ditch, and to a depth there-

under of about twenty-five feet, thus destroying the said ditch, and at the same time washed away also a box that had been placed in the said ditch by plaintiff, at defendant's request, before the commencement of this suit, said box being placed across a cut that defendant might, if he desired, run water thereunder, and the said ditch preserved by placing supports or timbers under said box or flume; and plaintiff avers that he has been informed and verily believes and charges the truth to be that defendant did said washing, and destroyed plaintiff's ditch wantonly, recklessly, and regardless of plaintiffs rights, and not in good faith, but to worry, annoy, injure, and black-mail plaintiff; that said injury, as above stated, was caused by the sudden flowing
18 of a large volume of water turned upon said ditch by defendant, rendering it impossible to preserve the said ditch by any supports to said box or otherwise.

And plaintiff further avers that thereafter, to wit, on the third day of February, A. D. 1874, the employees of plaintiff, acting under his, plaintiff's, direction, proposed erecting a flume a distance of about three hundred feet, and extending across the rim-rock in front of the cut that had been washed through plaintiff's ditch by defendant, and extending about one hundred and fifty feet on each side of said cut and about one hundred feet in front thereof. To this defendant at first consented that said flume should be so constructed, saying it would do him no harm, but afterward, and after plaintiff had got lumber on the ground to construct said flume, retracted and refused to permit said flume to be erected upon his alleged claims, threatening to wash down any flume that might be erected or ditch that might be dug thereon, unless plaintiff paid him his attorney's fees in this suit, all expenses that he had been put to, and the suit withdrawn, and still continues to make said threats.

And plaintiff avers that said flume has been erected over the line of ground agreed upon by and between plaintiff and defendant; that the said ground and that portion of defendant's alleged claims over which the ditch and flume aforesaid of plaintiff runs is valueless as mining ground, and that the gold-bearing channel, if there is one in said alleged claims, lies farther back in the hill and above the said ditch of
19 plaintiff, and that the working of said claim as a mining claim will not be impeded or interfered with by plaintiff's said ditch or flume; that the defendant, as plaintiff has been informed and verily believes, did not, any time while washing away the ground over which said ditch runs, make any money or get or save any gold, but rather that the said defendant, during said times, lost money.

Plaintiff further avers, upon information, and he verily believes the truth to be, that the said defendant was, and is, knowing to the fact that the said ground is valueless for mining purposes; that the said work was done, and defendant is now doing work on said alleged claims below said ditch with the knowledge that the said work or mining will not be remunerative, and knowing that the gold-bearing channel, if there is any in said alleged claims, lies above, and not below, plaintiff's said ditch; and that said work is not being done to develop said alleged mining claims, but rather to injure, annoy, and black-mail this plaintiff, and compel plaintiff to purchase defendant's pretended rights thereto; that said defendant is insolvent, and has no property of any value, and is therefore unable to respond in damages to this plaintiff for any injury that plaintiff may sustain by reason of defendant's wrongful acts.

And plaintiff avers that by reason of the wrongful and unlawful acts

of the defendant committed as aforesaid that plaintiff has sustained a further damage of five hundred dollars.

20 Wherefore, and by reason of the premises, plaintiff prays judgment against defendant for the sum of one thousand dollars damages and costs, and that until the determination of this cause the defendant, his agents, servants, and employees be restrained and enjoined from the commission or continuance of the wrongs and injuries aforesaid, and from interfering, in any way, with said ditch, flume, or ditch property, or its uses, and that upon the final trial such injunction be made perpetual, and that plaintiff be granted such other and further relief as may be deemed just and equitable.

MYERS & FELLOWS & FULWEILER.
Att'ys for Plaintiff.

STATE OF CALIFORNIA,
County of Placer, ss:

T. G. Durning, being duly sworn, on his oath says that he has heard read the foregoing amendment to the original complaint in this action, and knows the contents thereof, and that the same is true of his own knowledge, except as to such matters as are therein stated on information and belief, and as to those matters he believes it to be true; that he is the attorney in fact of the plaintiff, and the facts are within affiant's knowledge, and that the plaintiff is absent from the State of California.

T. G. DURNING.

Subscribed and sworn to before me this 14th day of February, 1874.
B. F. BURT,
County Clerk.

(Indorsed :)

21 Service accepted by copy this 14th day of February, 1874.
HALE & CRAIG,
Att'ys for Defendant.

Filed February 14th, 1874.
B. F. BURT,
Clerk.

Answer to amended complaint.

(Title of court and cause.)

Comes now the above-named defendant, by attorney, and answering plaintiff's amended and supplemental complaint filed in the above-entitled cause, admits that between the twenty-ninth and thirty-first days of January, 1874, he did wash away about forty feet in length of plaintiff's ditch to a depth of about twenty feet thereunder; also plaintiff's box in and being part of said length of said ditch so washed away, said box being about eleven feet in length, two feet deep and three feet wide in bottom; but defendant denies that he did said acts, or either of them, in disregard or regardless of the alleged or any rights of plaintiff, or that said box so washed down had been placed across a cut, as and for the purposes averred in said complaint, at his request made at any time, or that said acts, or either of them, were so done wantonly, recklessly, or not in good faith, or for the purpose or with the intent to wrong, annoy, injure, or blackmail plaintiff, or that the same were so done otherwise, or with other or different intent, than as hereinafter averred and set forth.

22 Defendant further denies that at the time alleged in said com-

plaint, or at any time, he consented to the construction of the line of flume as described in said complaint, or any line of flume upon his mining claims and premises described in his answer heretofore filed to plaintiff's original complaint herein, or that then or ever he said as averred in said complaint, or considered that said line of flume so described, or as since constructed by plaintiff, would do him no harm, or that he ever retracted any consent which he had given for the erection by plaintiff of said or any flume on his said claims and premises; or that he ever threatened to wash down any flume that might be erected, or any ditch that might be dug thereon, upon the contingency as in said complaint averred, or any contingency whatever, or that he does now or has at any time so threatened.

Defendant denies that the line of flume described in said complaint as having been constructed by plaintiff has been so erected on the line, or any line, of grounds ever agreed upon between him and plaintiff; or that the grounds and portion of his said mining claims on and over which the said flume has been erected by plaintiff is valueless as mining ground, or that the gold-bearing channel, or channels, within his said mining claims lies wholly further back in the hill, or above plaintiff's said ditch; or that the working by defendant of his said mining claims will not be impaired or interfered with by said ditch or flume; or that while doing the work in his said claims which resulted in the washing
23 down of said ditch and box, as hereinbefore admitted, he made no money or saved no gold, or thereby lost any money, except as hereinafter admitted and averred.

Defendant denies that he ever was, or is, knowing to the fact, or that such is the fact, that said ground, to wit, where said box and portion of ditch stood, where said flume or other portions of plaintiff's ditch, within the boundaries of his (defendant's) said mining claims are situated, are valueless for mining purposes, or that he knows, or has reason to believe that said or any work heretofore done, or hereafter proposed or intended to be done by defendant below said ditch, on his said claims will not be remunerative; or said work done or proposed is not so done or proposed for the purpose of developing, or legitimately and reasonably to develop or mine his said claims; or that said work so done or proposed is for the purpose, or with intent to injure, annoy, or blackmail plaintiff, or to compel or induce him to purchase defendant's real or pretended rights to said claims and premises, or that the defendant is insolvent; but, on the contrary, alleges that he is, and has been, able and willing to pay and discharge all his just debts and liabilities, and will so continue, unless by reason of the wrongful and oppressive acts of plaintiff he, plaintiff, shall continue, as he has hitherto done, by the course and as the result of this suit, and the restraining and injunction orders, by false representation procured therein, and other causeless, wicked, and oppressive judicial proceedings by him heretofore set on foot to harass and wholly prevent him from working
24 his said claims, and enjoying the benefits and profits, or any benefit or profit, of his said mining claims and premises.

Defendant denies that by reason of his alleged or any wrongful act, as set forth in said complaint, plaintiff has sustained damages in the sum of five hundred dollars, or any other sum.

And defendant avers, in respect to the said washing away of said portion of plaintiff's ditch and box therein, that said portion of ditch and box had been constructed and placed by plaintiff on his said mining claims without defendant's consent and against his will; that the same were so constructed and located upon, over, and across his said

mining claims described in his former answer filed herein that he could not prosecute the business of developing and mining his said claim in a reasonable and judicious manner, and as he had planned, intended, and made arrangements at considerable expense to do prior to the commencement of this action, as the most judicious and advantageous method, without washing the same down, as hereinbefore admitted.

Defendant further avers, in respect to plaintiff's said flume and the site of its construction, that defendant cannot continue his hydraulic mining operations in his said claim without greatly endangering the undermining and thereby causing the destruction of said flume. That portions of the foundation thereof rest upon earth and gravel which it will be necessary for defendant to wash away in the prosecution of his said mining operations.

Defendant further avers that until the present water season
25 he had not been able to make any thorough tests and developments of that portion of his said claims which hitherto for years past he had and still does intend to mine by hydraulic process, and which he verily believes, and has good reason to believe, to be valuable, and will prove remunerative as hydraulic mining grounds, when worked by the process described in his said original answer herein, by reason of his inability hitherto to obtain the necessary supplies of water and having the necessary elevation for that purpose

That the supplies of water and the attainable elevation thereof above said portions of his said claims, which have been and are obtainable from said Fulweiler's or Kirk's gulch, have been and are insufficient when taken alone for the purposes of said hydraulic mining last aforesaid; but that he had before the commencement of this action made arrangements with the owners of the miner's ditch, which possesses the said necessary elevation above said hydraulic grounds, to obtain said necessary supplies of water during the present water season, and had for one day only before the service on him of the last restraining or injunction order herein granted had the use thereof, during which period of use he was not able to perform the work or make the developments necessary to realize in gold any practical results, or make any tests or developments of the real or probable value of said portions of his said claims.

Defendant further avers, upon information and belief, that plaintiff or his agents so intimidated said owners of said miner's ditch, by means
of threats of suits and other judicial proceedings, to be taken
26 and prosecuted against them by plaintiff if they should continue to furnish the defendant with said supplies of water from said ditch, that said owners after said one day declined to furnish defendant with said supply of water, although they had the same for sale in their said ditch and were willing otherwise to furnish the same to defendant. That thereafter, and until said last restraining order herein, defendant continued at other points within his said claims, and below plaintiff's ditch, to mine with such water as he could procure and use from said Fulweiler's or Kirk's gulch, which, however, by reason of its insufficient quantity and want of necessary elevation and head, did not enable him to do any effective mining, but did enable him to so far prospect and test the same as to show that the same contained gold, and in probable quantities sufficient to make the same available and valuable as hydraulic mining grounds when water sufficient in quantity and requisite head and elevation can be obtained for that purpose, and that the same cannot be worked without washing down other large portions of plaintiff's ditch situate above and on his, defendant's, mining claims.

Defendant further avers that by reason of the premises last hereinbefore stated he was, by force of said last restraining order granted herein, prevented from mining his said claims, and will be so prevented during its continuance, and that said ditch is, as, and for the reasons, except as qualified hereinbefore set forth in his said original answer filed herein, a nuisance, and the maintenance thereof on his said claims will, in effect, prevent him from mining his said claims.

27 Defendant further says, and by way of qualifying his said former answer filed herein, that said ditch is not wholly below the whole or the greater portion of his said hydraulic ground, although located and excavated over and through the lower and front part thereof, and is so situate that the maintenance thereof does and will prevent the working and developing of his said claims as aforesaid.

Defendant renews herein the prayer of his said former answer filed herein.

HALE & CRAIG,
Att'ys for Defendant.

STATE OF CALIFORNIA,
County of Placer, ss:

J. T. Kirk, being first duly sworn, on his oath says that he has heard read the foregoing answer and knows the contents thereof; that the matters and things therein set forth are true, except as to the matters and things therein stated on information and belief, and as to those matters, he says that he believes it to be true.

(Signed) JOHN T. his + mark KIRK.
By J. E. HALE.

Sworn to and subscribed before me this 25th day of February, A. D. 1874.

I. IVES FITCH,
County Judge.

(Indorsed:) Service of the within by copy acknowledged this 28th day of February, 1874. , plaintiff's attorney. Filed February 25th, 1874. B. F. Burt, clerk.

28 *Plaintiff's bill of exceptions*—(*A*) *No.* 1.

(Title of court and cause.)

Be it remembered that the said cause coming on regularly for trial at the May term of said court, 1874, the plaintiff offered to introduce evidence of the witnesses (A. Clark and others), to the effect that the alleged mining claim of defendant could be worked out without at all interfering with the ditch or flume of plaintiff; that the ground upon and over which the ditch and flume run was valueless for mining purposes.

To this evidence defendant's counsel objected as immaterial and irrelevant.

Objection sustained by the court upon the authority of Correa vs. Trietas (42 Cal., 340).

Plaintiff's counsel duly excepted.

This bill of exceptions is correct.

T. B. REARDEN,
District Judge.

(Indorsed:) Filed May 12th, 1874. B. F. Burt, clerk.

Findings of fact.

(Title of court and cause.)

First. That plaintiff's ditch, described in his complaint filed herein, was located and constructed in the year A. D. 1872.

Second. That defendant is the owner and possessor of certain
29 valid mining claims; also of certain ditches and water rights, which are correctly described in his answers filed in said cause; and that he has been so the owner and possessor of said mining claims, ditches, and water rights continuously and uninterruptedly for more than five years next before the commencement of this action.

Third. That plaintiff's said ditch, located and constructed as aforesaid, intersects and traverses defendants' said mining claims and intersects defendant's said ditches, as set forth in said answers.

Fourth. That defendant has done the acts recited in said complaint, but they were done in good faith to develope and to mine his said mining claims; and in the exercise, use, and enjoyment of his said water rights by means of his said ditches, in the usual and in a reasonable manner.

Fifth. That defendant's said mining claims, ditches, and water rights are located and situate on and part of the public mineral lands of the United States.

Sixth. That defendant is, and for more than five years next before the commencement of this action, has been a citizen of the United States.

Seventh. The acts complained of tend to injure and destroy the plaintiff's ditch at the point specified in the complaint.

The conclusions of law are, that plaintiff is entitled to take nothing by this action. That the injunction against defendant hereinbefore granted, should be dissolved; and that the defendant is entitled to have judgment against plaintiff for his costs of suit.

30 Let judgment be entered accordingly.

T. B. REARDEN,
District Judge.

(Indorsed:) Filed May 22d, 1874. B. F. Burt, clerk.

Judgment.

(Title of court and cause.)

This cause came on regularly for trial, Mess'rs Myers & Fulweiler appearing as counsel for the plaintiff, and Mess'rs Hale & Craig for the defendant. A trial by jury having been expressly waived by counsel for the respective parties, the cause was tried before the court sitting without a jury.

Witnesses on the part of the plaintiff and the defendant were sworn and examined; the evidence being closed, the cause was submitted to the court for consideration and decision, and after due deliberation thereon, the court delivers its finding and decision in writing, which is filed and orders that judgment be entered in accordance therewith.

Wherefore by reason of the law and the finding aforesaid, it is ordered, adjudged, and decreed, that the injunction heretofore granted in this action be and the same is hereby dissolved, and that the defendant, J. T. Kirk, do have and recover from the plaintiff, B. B. Titcomb, his costs

and disbursements incurred in this action amounting to the sum of one hundred and thirty-two $\frac{55}{100}$ dollars ($132.55.)

Judgment rendered May 22d, A. D. 1874.

Attest: B. F. BURT,
County Clerk.

31 *Bill of exceptions.*—(B) No. 2.

(Title of court and cause.)

On the trial of this cause the plaintiff proposed to show by witness Clark and others, that the defendant's alleged mining claim was less valuable for mining than for agricultural purposes; defendant's counsel objected upon the ground that it was irrelevant. The court sustained the objection and the plaintiff's counsel excepted.

And thereafter, and after the trial and submission of the cause, the court found the facts and conclusions of law appearing in the judgment roll; the plaintiff excepts to the 2d, 4th, and 5th, of said findings upon the grounds hereinafter stated.

2nd. The facts and evidence upon the points presented upon said findings are these: The parties on the trial and in open court admitted (and the cause was so treated all the way through) that the ownership of the land upon which defendant's alleged mining claims and ditches are situated, is in the general government.

But the evidence showed that the defendant and his grantors had entered upon said land for mining purposes, and had held possession and used the same for such purposes in accordance with the usages and customs of miners of the vicinage for more than five years next before the commencement of this action, and that the defendant is a native-born citizen of the United States.

32 3rd. The plaintiff in the trial disclaimed any interest or estate whatever in said Fulweiler's gulch waters, and no other water rights were shown in the defendant. But the plaintiff did not amend or offer to amend the averments of the complaint respecting the appropriation and ownership of the waters of the South fork of Shirt-tail Cañon, and the streams and tributaries intermediate it and "Georgia Hill," and the evidence showed that the said Fulweiler's gulch was one of said tributaries and streams.

4th. The defendant himself testified that when he cut the ditch there was snow on the ground; that he had no use for the water then, and that he cut the ditch because he thought that plaintiff might gain some advantage over him if he allowed his water to run in plaintiff's ditch. It was also shown by the testimony of the defendant and other witnesses that at the point of said cutting he had a ditch for the conveyance of said waters for his mining uses, and had so used the same for more than a year prior to the location or construction of plaintiff's ditch; that defendant's said ditch had been filled up and obstructed by the plaintiff's ditch so as to divert the waters of Fulweiler's gulch into plaintiff's ditch; that the said cutting of plaintiff's was only for the purpose, and to the extent, necessary to reopen defendant's said ditch so that the waters conveyed thereby might flow into the reservoir of the defendant to be employed in the defendant's mining uses; the quantity of water at that time flowing in said Fulweilers' gulch was insufficient for said practical uses. There was no other evidence in defendant's favor

33 as to his reasons for cutting the ditch.

5th. The value of the flume was $300.

The grounds upon which the plaintiff excepts are as follows:

To the 2nd finding: That the lands of the alleged ditches and claims are public lands of the United States, and there is no evidence of there being defendant's or that he had any right to any other waters than those of Fulweiler's gulch.

To the 4th finding: That there was no evidence as to any usual or reasonable manner being observed by defendant in the use of his alleged property, and being held to use it in his own way, his bona fides has no basis.

To the 5th finding: That the character of the land was not disclosed.

Plaintiff also excepts to the 7th finding, because it does not show damage $300 or any definite sum.

The foregoing bill of exceptions has been duly settled and is correct.

Done at chambers, the 18th day June, 1874, in the city of Nevada.

T. B. REARDEN,
District Judge.

(Indorsed:) Filed June 22d, 1874. B. F. Burt, clerk.

(B.)

Notice.

(Title of court and cause.)

The plaintiff intends to move for a new trial before the hon. the
34 judge of said court, at chambers, Nevada City, on Monday, the sixth day of July next, at one o'clock p. m., upon the grounds:

1st. That the decision of the court to the effect that the plaintiff is entitled to take nothing by his suit is against law.

2nd. That the court erred in rejecting the proffered testimony of Clark and others; that the alleged claims could be worked out without interfering with the ditch or flume; and that said claims are valueless for mining purposes.

3rd. That the court erred in refusing plaintiff to show that said claims are less valuable for mining than for agricultural purposes.

4th. That the evidence is insufficient to justify the 2d, 4th, 5th, and 7th findings in the particulars mentioned in bill of exceptions marked "B."

J. M. FULWEILER AND
B. T. MYERS,
Attorneys for Plaintiff.

(Endorsed:) Filed June 22d, 1874. B. F. Burt, clerk.

Stipulation.

(Title of court and cause.)

It is hereby stipulated that plaintiff's motion for a new trial in the above-entitled cause be, and the same is hereby, submitted without argument, upon the judgment roll, and settled bills of exceptions, and notice of motion thereon.

Auburn, July 3rd, 1874.

FULWEILER & MYERS.
35 *Plaintiff's Attorneys.*
HALE & CRAIG,
Defendant's Attorneys.

(Endorsed:) Filed July 8th, 1874. B. F. Burt, clerk.

Order overruling motion for new trial.

(Title of court and cause.)

The motion for a new trial herein was duly submitted on the sixth day of July upon the judgment roll, findings, the settled bill of exceptions Nos. 1 and 2, and the notice of said motion (and the same are hereby made a part of the statement).

And now, the said motion, having been duly considered by the court, is overruled upon the ground that no error can be perceived in the rulings and decisions specified in the said notice of motion for a new trial.

The plaintiff excepts to this decision.

7th July, 1874.

T. B. REARDEN,
District Judge.

(Indorsed:) Filed July 8th, 1874. F. B. Burt, clerk.

Notice of appeal.

(Title of court and cause.)

Please take notice that the plaintiff in the above-entitled action hereby appeals to the supreme court of the State of California from the
36 judgment therein made, and entered in the said district court on the twenty-second day of May, A. D. 1874, in favor of defendant in said action, and against said plaintiff, and from the order overruling plaintiff's motion for a new trial, filed in said action on the eighth day of July, A. D. 1874, and from the whole thereof.

Auburn, July 18th, 1874.

B. F. MYERS AND
JOHN M. FULWEILER,
Attorneys for Plaintiff.

To the clerk of said district court, and to Mess'rs Hale & Craig, attorneys for defendant.

(Indorsed:

Service accepted by copy this eighteenth day of July, 1874.

HALE & CRAIG,
Attorneys for Defendant.

Filed July 18th, 1874.

B. F. BURT,
Clerk.

Certificate.

STATE OF CALIFORNIA,
County of Placer:

I, B. F. Burt, county clerk of the county of Placer, State of California, and ex-officio clerk of the fourteenth judicial district court thereof, hereby certify the annexed and foregoing to be a true and correct copy of the original complaint, answer, amended complaint, answer to amended complaint, bill of exceptions No. 1, findings, judgment, bill of exceptions
37 No. 2, notice of motion for new trial, stipulation, order overruling motion for new trial, and notice of appeal in the foregoing entitled action; that I have compared the same with said originals, and

that it is a correct transcript therefrom and of the whole thereof, now on file and of recordin my office.

And I further certify that an undertaking on appeal in due form as required by law was filed in my office at the same time of filing said notice of appeal.

Witness my hand and the seal of said district court, at office, in Auburn, this twenty-second day of August, A. D. 1874.

[SEAL.] B. F. BURT.
Clerk.

(Indorsed:)

We hereby acknowledge service of the within transcript by copy this 11th day of Sept., 1874.

HALE & CRAIG,
Att'ys for Respondent.

Filed Sept. 14, 1874.

GRANT I. TAGGART,
Clerk,
By ALLEN TILLINGHAST,
Deputy.

38 In the supreme court of the State of California, January term, A. D. 1876. On appeal from the district court of the 14th judicial district in and for the county of placer.

B. B. TITCOMB, APPELLANT,
vs.
J. T. KIRK, RESPONDENT. } No. 4473.

TITCOMB
vs.
KIRK.

It being suggested that B. B. Titcomb, appellant herein, has deceased since this appeal was perfected, it is ordered that S. Jennison, executor of the estate of said Titcomb, be substituted as appellant herein in place of said Titcomb, deceased.

I, D. B. Woolf, clerk of the supreme court of the State of California, do hereby certify that the preceding and annexed is a true and correct copy of the minutes of said court held Monday, February 14th, A. D. 1876, in said cause, as shown by the records of my office.

Witness my hand and the seal of the court, this 8th day of June, A. D. 1876.

[SEAL.] D. B. WOOLF,
Clerk,
By H. P. BUSH,
Deputy Clerk.

39 In the supreme court of the State of California. April term, A. D. 1876. On appeal from the district court of the 14th judicial district in and for the county of Placer.

B. B. TITCOMB, S. JENNISON, EXECUTOR,
appellant,
vs.
J. T. KIRK, RESPONDENT. } No. 4473.

And now, at this day, this cause being called, and having been here-

tofore submitted and taken under advisement by the court, and all and singular the law and premises being by the court here seen, heard, understood, and fully considered, the opinion of the court herein is delivered by the court.

Whereupon it is now considered, ordered, adjudged and decreed by the court here, that the judgment and order of the district court of the 14th judicial district in and for the county of Placer, in the above-entitled cause, be and the same is hereby affirmed with costs.

I, D. B. Woolf, clerk of the supreme court of the State of California, do hereby certify that the foregoing is a true copy of an original judgment and opinion entered in the above-entitled cause, on the fifth day of May, A. D. 1876, and now remaining of record in my office.

Witness my hand and the seal of the court, affixed at my office this 8th day of June, A. D. 1876.

[SEAL.]

D. B. WOOLF, *Clerk*,
By H. D. BUSH, *Deputy*.

TITCOMB *vs.* KIRK. } No. 4473. Filed May 5th.

By the court:

Appellant urges that he should have had judgment, in accordance with the prayer of his complaint, under an act of Congress entitled "An act granting the right of way to ditch and canal owners," approved July 26, 1866, and an act amendatory thereof, approved July 9, 1870.

The provisions of the statutes referred to and of the "act to promote the development of the mineral resources of the United States," approved May 10, 1872, should be considered and construed together; and it is apparent that it was the purpose of the legislation, taken as a whole, to recognize in, and confirm to, the respective classes of licensees therein mentioned the same rights which were accorded to them by the State courts prior to the passage of the acts of Congress.

There is nothing in the ninth section of the act of 1866 which requires of us to hold that the defendant's right to possess and enjoy his mining claim must be subordinated to the right of plaintiff to construct his ditch. The clause in the ninth section, "And the right of way for the construction of ditches and canals for the purposes aforesaid is hereby acknowledged and confirmed," cannot be construed to enlarge the grant to ditch owners, so as to include a right not "recognized and acknowledged by the local customs, laws, and the decisions of the courts." Nor does the proviso authorize the construction of a ditch or canal across the mining claim of another, whatever may be its effect in respect to "settlers" on agricultural lands of the United States.

Judgment and order affirmed.

40 *Assignment of errors.*

In the supreme court of the State of California.

B. B. TITCOMB, S. JENNISON, EXECUTOR, *vs.* J. T. KIRK.

I. The supreme court of the State of California erred in its construction of the acts of Congress mentioned in the opinion in holding to the effect—

1. That the grant of the right of way for the construction of ditches over the public lands of the United States is ineffectual unless recog-

nized and acknowledged by the local custom, State laws and State court decisions.

2. That the act of July, 1866, with the amendments of 1870, gives the plaintiff no more nor better right to run his ditch across the defendant's mining claim than he had before its passage.

3. That the 9th section of the act of July, 1866, is a nullity.

4. That the defendant has more than a mere license revocable at the pleasure of the general government.

5. That the plaintiff has less than a grant irrevocable.

6. That the plaintiff has no right to construct his ditch over the
41 mining claim of the defendant.

7. That the defendant's alleged right of possession is not subordinate to the plaintiff's right to construct his ditch.

8. That the act of May 10th, 1872, has application.

9. That there is a difference whether the lands traversed by the ditch are agricultural or mineral, occupied or unoccupied.

10. That ditch owners had a right of way over the public lands prior to the passage of said act of July, 1866.

11. That sustaining the plaintiff in his right of way as claimed by him, and granted by said act of July, 1866, would enlarge the grant to ditch owners.

12. That the proviso mentioned in the opinion is not effected by the 17th section of said act of July, 1870.

II. The said supreme court erred in its decision. The plaintiff had a right to construct his ditch over the public lands of the United States, whether mineral or agricultural, occupied or unoccupied, and is entitled to the relief prayed for. This is evident—

1. From the title of said act of July, 1866.

2. From the 5th, 8th, and 9th sections of said act.

42 3. From the first clause of the 17th section of said amendatory act of 1870.

4. The act of May 10th, 1872, don't deal with rights of way for any purpose and cuts no figure.

5. No right of way for ditches over the public lands of the United States ever was or ever could be acquired by local customs, State laws, or State court decisions.

6. The defendant has a mere license—no right at all as against the general government; even if he has, it is subject to the plaintiff's grant.

7. The plaintiff's grant is and was absolute upon the construction of his ditch, and no custom, State law, or State court decisions can affect it.

8. The defendant's remedy lies in damages, and not in trespass destroying the ditch.

Wherefore plaintiff prays for a reversal of said judgment of the supreme court of the State of California.

B. F. MYRES &
J. M. FULWEILER,
Att'ys for Pl'ff in error.

43 In the supreme court of the State of California.

B. B. TITCOMB, S. JENNISON, EXECUTOR, APpellants,
vs.
JOHN T. KIRK, RESPONDENTS. } No. 4473.

Know all men by these presents that we, Jos. M. Nougues and R. P.

Kelley, of the city and county of San Francisco, State of California, are held and firmly bound unto John T. Kirk in the sum of one thousand dollars gold coin of the United States of America, to be paid to the said John T. Kirk, his heirs, executors, administrators, or assigns, for which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators firmly by these presents. Sealed with our seals and dated the day of May, A. D. one thousand eight hundred and seventy-six.

The condition of the above obligation is such that whereas the above-named B. B. Titcomb, by his executor, has prosecuted a writ of error to the Supreme Court of the United States of America to reverse the judgment rendered in the above-entitled action on the 5th day of May, A. D. 1876, by the supreme court of the State of California: Now, therefore, the condition of this obligation is such that if the above-named B. B. Titcomb, by his executor, S. Jennison, shall prosecute his said writ of error to effect and answer all damages and costs if he fail to make good his plea, then the above obligation to be void; other-
44 wise to remain in full force and virtue.

JOS. M. NOUGUES. [SEAL.]
R. P. KELLEY. [SEAL.]

Signed, sealed, and delivered in presence of.

STATE OF CALIFORNIA,
City & County of San Francisco, ss:

Jos. M. Nougues and R. P. Kelley, being duly sworn, on oath, each for himself, do say that he is a resident of the city and county of San Francisco, State of California, and a householder or freeholder therein, and is worth the sum of one thousand dollars, exclusive of property exempt from execution, over and above his debts and liabilities.

JOS. M. NOUGUES.
R. P. KELLEY.

Sworn and subscribed to before me this 26th day of May, 1876.
[SEAL.] JOHN HAMILL,
Notary Public.

The amount of the bond herein is fixed at $1,000, and the same, with the sureties above named, is hereby approved.

W'M T. WALLACE,
Chief Justice.

45 (Endorsed:) No. 4473. In the Supreme Court of the United States on writ of error. Jos. M. Nougues & R. P. Kelley to John T. Kirk. Bond. Filed May 30, 1876. D. B. Woolf, clerk, by H. P. Bush, deputy.

I, D. B. Woolf, clerk of the supreme court of the State of California, do hereby certify that the preceding and annexed is a true and correct copy of the original bond filed in my office on the 30th day of May, 1876, as shown by the records of my office.

Witness my hand and the seal of the court this 15th day of June, A. D. 1876.

[SEAL.] D. B. WOOLF, *Clerk*,
By H. P. BUSH, *Deputy*.

46 In the supreme court of the State of California.

B. B. TITCOMB, S. JENNISON, EXECUTOR,
vs.
J. T. KIRK. } No. 4473.

I, D. B. Woolf, clerk of the supreme court of the State of California, do hereby certify that the annexed and foregoing documents and papers are and constitute a true copy and transcript of the record and of all the proceedings in the above-entitled cause, as the same appear upon the records and files of said court in my office.

And I do further certify that on the 30th day of May, 1876, the said plaintiff in error filed in this court a writ of error (herewith transmitted) duly allowed by the Hon. W. T. Wallace, chief justice of this court, removing said cause to the Supreme Court of the United States, and lodged in my office a copy of such writ of error for the defendant in error, and also on the 15th day of June, 1876, filed a citation (herewith transmitted) purporting to have been served upon the defendant in error in person; also a bond in the sum of one thousand dollars, with sureties, approved by the chief justice of this court, a copy of which is hereto annexed and made part hereof, conditioned that said plaintiff in error shall prosecute his said writ to effect, and in case he fail to make his plea good to answer all costs, and also that said plaintiff in
47 error has executed a bond in the sum of two hundred dollars (herewith transmitted) for costs of clerk of the Supreme Court of the United States.

Witness my hand and the seal of the court, affixed at my office, this fifteenth day of June, A. D. 1876.

[SEAL.] D. B. WOOLF,
Clerk of the Supreme Court of the State of California.

(Indorsement on cover:) No. 199. S. Jennison, ex'or of B. B. Titcomb, plaintiff in error, vs. J. T. Kirk. California sup. court. Filed 7th October, 1876.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1878.

JENNISEN, PLAINTIFF IN ERROR,
vs.
KIRK. } 199.

This cause comes here on writ of error to the Supreme Court of the State of California, upon a claim of right under certain acts of Congress denied by that, the highest court of the state. Personal service of citation was had upon the defendant in California, June 12th, 1876. No appearance on his side.

THE FACTS

Of the case are few and simple. The plaintiff's testator having acquired, as provided by law, a right to the use of certain waters in California, constructed a ditch to use in connection therewith over public mineral land of the United States occupied at the time and long prior thereto by the defendant as a mining claim. After the ditch was completed and the water running in it, the defendant cut and washed away parts of the ditch, claims the right to do so, and to destroy the ditch if necessary in his mining operations. In running the ditch we cut a ditch of defendant's,

but adjusted crossings, and these he washed away. This suit was thereupon instituted to restrain the defendant from injuring the ditch.

There is no question as to plaintiff's right to the use of the water; nor as to his constructing the ditch for mining purposes; nor as to defendant's title being that of possession only; nor as to breaking any enclosure, for there was no enclosure; nor as to the character of the land being public mineral land of the United States, "not" reserved for public uses; nor as to defendant's claim being a placer-mine; nor as to defendant's ditches or water rights mentioned in the findings, leaving the only

Question Involved

In this action a construction of the acts of Congress mentioned in the opinion of the Supreme Court of California, and a decision of the question, whether, in view of the other acts, the ninth section of the act of July, 1866, does or does not confer upon one having the water right the right of way for ditches for mining purposes over the public land of the United States occupied at the time by another, having no other right than that of possession only. We claim it does: the Supreme Court of California decides it does not, and affirm the judgment of the lower court, which is also against us. The question is thus raised, and, although a question of law, it is also put in issue by the pleadings. We assign as

Error.

I.

That said supreme court erred in its construction of said acts of Congress in holding to these effects: 1st. That said acts confer no ditch right not sanctioned by local customs, &c. 2d. That defendant's possession is not subject to plaintiff's right of way. 3d. That the act of May, 1872, has application; and, finally, in classifying the rights of the

parties in the same category, and holding both as mere licensees.

II.

That said supreme court erred in its decision in deciding and adjudging against the right claimed, and in affirming the judgment of the lower court.

ARGUMENT.

On the conditions stated, and which will be noticed hereafter, we insist that the ninth section of the act of July, 1866, confers two rights: one, the right to the use of water for mining purposes, called the *water right;* the other, the right of way for ditches for like purposes, called the *ditch right.*

That the ditch right is not limited to *ditches in existence at the passage of the act,* but is by the proviso extended to ditches constructed after that time.

That this ditch right is not limited to *unoccupied* lands, but is by the same proviso extended over the *possession* of settlers on the public domain.

That the ditch right is not limited to *agricultural* lands, but is, by the 17th section of the amendatory act of July, 1870, extended to *all public lands affected by that act,* and as that act deals especially with placer-claims (12th section), and as occupied mineral lands are nowhere excepted, it logically results that the ditch right is extended directly over the defendant's mining claim.

Again, should the defendant ultimately obtain patent for his land, mineral or agricultural, it would, by said 17th section, be subject to plaintiff's ditch right used in connection with his water right, and according to practice that fact would appear on the face of the patent.

SPECIFIC ERRORS OF CONSTRUCTION.

The holding of the Supreme Court of California to the effect that said acts confer no ditch right not sanctioned

by "local customs," &c., is clearly erroneous. We have just seen that the ditch right extends to lands occupied by settlers. This is directly against "customs, decisions," &c., 6 Cal., 45, and if by the term "settlers," agricultural lands alone are implied, then as we have also just seen, this ditch right extends to placer-claims, which is this case, and here also the right is against "customs," &c. But the glaring mistake made by said supreme court is this: that the phrase, "recognized and acknowledged by the local customs, laws, and the decisions of the courts," or any part of it, has any application at all to the *ditch* right. It is the predicate or basis of the *water* right, but wholly omitted from the clause giving the *ditch* right. The *ditch* right is in no sense dependent on any part of that phrase. Such construction would antagonize the section. The ditch right is dependent on not exceeding two conditions, neither of which are embraced in that phrase: one, that the purpose of the ditch be lawful, for that is manifestly the meaning of "or other purposes" used in the first clause of the section; the other, that the ditch man have also the water right. These conditions, existing as they do in this case, the ditch right attaches by force of these statutes and is as independent of "customs," &c., as is the right of way for highways over the public lands of the United States granted by the eighth section of the act. Instead of the ditch, suppose we had run a public road across defendant's claim, would he be justified in washing away the road on the plea that the right of way for the road is not "recognized and acknowledged by the local customs, laws, and the decisions of the courts?" If not, why upon like plea should he be upheld in washing away our ditch? That long phrase is just as applicable to the road as to the ditch, and if no barrier to the one, is not to the other.

Holding, as a separate proposition, that the defendant's possession is not subject to plaintiff's right of way is equally fallacious. Suppose his possession that of a settler, can there be any question as to our right of way across it? And is his

possession in this respect any better shielded because it is that of a placer-miner? Where is the occupant of public land with no other right than that of simple possession anywhere excepted from the right of way for ditches over his lands? Evidently the intention of the acts is to give the right of way for the construction of ditches for mining purposes, &c., over all the public land of the United States not reserved for public uses, leaving injured possessors to their remedy, which is damages. No other construction will harmonize the sections.

The act of May, 1872, invoked by said supreme court in aid of its construction, has no application. It simply provides that certain persons therein named may explore, occupy, and purchase the public mineral lands, and provides a mode of purchase. It don't deal with rights of way for any purpose and cuts no figure.

Classifying the plaintiff's water and ditch rights with the defendant's right of occupancy, and putting both parties upon the same footing and as mere licensees, is also error. The rights and status of the parties are entirely different. The defendant has the right to *explore*, *occupy*, and *purchase* the land, but until he *purchases*, which he has not done nor attempted to do, his right may be revoked by the government and other disposition be made of the land. Not so with the plaintiff; his water right having been acquired as provided by law, and his ditch right consummated on completion, his rights are irrevocable on the part of the government. The defendant has *possession* only; the plaintiff substantially *title* to the water and *absolute right of way* for his ditch.

We respectfully submit the case and confidently expect a reversal, with directions for new trial.

B. F. MYRES,
For Plaintiff in Error.

April 12. 79 Rec'd N. K. Swayne

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1878.

JENNISEN, PLAINTIFF IN ERROR,
vs.
KIRK. } 199.

In addition to the former brief I wish to state a little more fully our views of the law of the case and the facts disclosed by the record.

THE LAW OF THE CASE

We claim to be this:

1st. That under the acts of Congress we have an absolute right of way for our ditch over defendant's mining claim.

2d. That as to any injuries resulting other than to the defendant's ditch and water rights, his remedy is in damages.

3d. That as to his ditch and water rights, they constitute no bar to the exercise of our right, but must be preserved without material disturbance, by properly adjusted crossings at the expense of the plaintiff; and—

4th. That it is only the *excess* in the user of the easement that may be abated. Or rather, I will state it this way:

1st. That injuries to the claim proper constitute no bar to the exercise of our right, but are compensated in damages.

2d. That both the parties, plaintiff and defendant, have rights of way for their ditches—that these rights of way are easements, governed and protected by the law of easements, and that by such law, the defendant's ditch being first, the burden is on the plaintiff to adjust the crossings, and this we say he did, and that it is the defendant, and not the plaintiff, who is in *excess* of his rights, Let us see—

The Facts.

Our ditch was cut by the defendant in November, 1873. We repaired it in January, 1874, by putting in a box across the cut as a conduit for our water, and leaving sufficient pass-way under it for the flow of the waters of the defendant, and it so remained until washed away by the defendant, as hereinafter stated. This repairing was done before the suit was brought, but as the defendant had threatened to cut or destroy the ditch at pleasure, the suit was instituted and temporary injunction granted.—(T., p. 3, folio 5; T., p. 5, 2d paragraph. As to the box, see top lines, page 9, of T., and folio 21, T., p. 10.) In his first answer defendant justified the cutting upon three grounds: 1st, His right to preserve his own water and ditch rights; 2d, His right to destroy the ditch because he could not otherwise mine his claim; and, 3d, That the plaintiff has no right as against the defendant to have his ditch there at all. This last defence embraces the other two, and is, as the whole case shows, the intended and only defence to this action.—(See defendant's first answer, T., p. 4 to 8, noting particularly folio 15.) The threats having been denied, and our ditch repaired, as aforesaid, the injunction was, on the filing of the answer, dissolved, and, had defendant done no more mischief, the suit was practically ended; but shortly after the dissolution of the injunction the defendant, as he admits, washed away about 40 feet in length of our ditch, and to

a depth under it of about 20 feet, including the box adjusted as aforesaid. We then erected a flume, some 300 feet in length, in front of the washed-away ditch, and having its centre opposite the point where the box had been, and extending along that part of defendant's claim where it could do him the least possible injury, if any at all, following as it did the line of rim-rock, and this flume he claims the right to destroy.—(See amended complaint, T., p. 8, folio 17 to 20.) Now, by his answer to the amended complaint (T., p. 10, folio 21 to 28) it will be seen that he washed away the ditch, and intends to wash away the flume and other portions of the plaintiff's ditch, not to guard, protect, or in any manner to preserve his ditch or water rights, but for the sole purpose of mining his claim. In addition to this, however, it is apparent that the washing away of our ditch could not have been done to preserve defendant's, for in washing away ours he washed away his own also; and it is equally apparent that it was not done to protect his water rights, as he claimed in his first answer, for he says his water was not of sufficient elevation to answer his then mining purposes (T., p. 12, folio 25), and he certainly got it no higher by washing away our ditch.

The "good faith" of the defendant, and "the usual and reasonable manner," mentioned in the fourth finding, cut no figure whatever. If the defendant has the right to destroy our property, it can make no difference in law, and certainly none in fact, whether he destroys it in good or bad faith, or in the usual and reasonable manner of destroying other people's property.

More than this, just see how the case stands now: Suppose the defendant justified in the first cutting of our ditch, and also that he is justified in washing away the 40 feet of the ditch, (which he is not,) still the question remains, has he now the right to take away our flume and substantially to destroy our property? The 4th finding may be excused upon the original pleadings, as all the defendant had done up to the time they were filed, exclusive of the

threats, was to re-instate his ditch as it was before we cut it; but after he had done this, and after we had adjusted the crossing so that his waters run as before, and after he had washed away our ditch and we had put up the flume, leaving his waters still running as before, the status of the case was changed, and the question then was and still is: Had the defendant the right to wash away our ditch as he did, and has he now the right to remove the flume, and substantially to destroy our property? And in the solution of this question it is impossible to conceive how "good faith," or "usual and reasonable manner," in the destruction of property, can have any application. Of course we admit the defendant's two rights—the one to explore, occupy, and purchase his claim; the other the like absolute right of way for his water ditches that we claim for ours, and that in running our ditch we must adjust crossings over any and all water ditches of the defendant crossed by us, and which were in existence when we constructed our ditch, and that this must be done in such manner as to secure, without material disturbance, the free flow of his waters as they flowed before. This we understand to be in accordance with the law of easements the world over, and in practice everywhere observed, where conflicting rights of way are held by different persons over the same point, the subsequent grantee or holder of the right conforming his crossings to those before him. Of course, in such crossings, as of railroad tracks, &c., greater nicety and exactness would be required than in cases of ditches, flumes, private roads, &c.; still, in even these last-named cases, material injury or disturbance must be avoided.

Now, if it be said that we are in fault because we first cut defendant's ditch, we reply: 1st, That thereafter, and after defendant had cut our ditch at the same point, the fault was cured by the box-crossing—that all this transpired before the suit was brought, and that at the time the defendant washed away the 40 feet of our ditch along with the box, his water was running in his ditch as freely and

undisturbed as it ever ran before, and that since the avalanche and erection of our flume, it is to be presumed that his waters run as they did before, and under the flume without impediment, and that they so run even unto this day; and, 2d, That, conceding the right of the defendant to cut our ditch in the first instance, still, after we had adjusted the crossing, and left his waters running as before, he had no right to wash away our ditch. He had a right to have his ditch there, and we had a right to cross it; not by cutting his ditch; I don't claim that, but by the box, which did him no injury. Now please observe right here that we don't say that we are to run our ditch so as not to injure the defendant's *mining claim proper*, for that is recompensed by damages, and might also be impossible, and thus destroy the right we claim; but what we say is this: that in crossing the defendant's *water ditches*, we are not to disturb the flow of his waters, and that should we do so, he has the right to remove or abate the disturbing cause exactly to the extent that it exceeds the limits of the use granted, or which is the same thing, the excess of the user of the easement, but no further. Say then, that our first cutting was such excess—he abated that; then we boxed the crossing—this we had a right to do, and defendant had no right to wash it away, but he did; then we put up the flume, leaving his waters running as he left them himself. Now, has he the right to destroy the flume? If so, upon what principle, statute, or authority? Such doctrine would completely bar the further construction of ditches, for probably in a hundred instances not one ditch can be found that does not somewhere or other, cross one or more other ditches, and so it would be with railroad tracks and all other cases involving easements.

On the trial of this cause in the court of first instance we offered to show that the defendant's mining claim could be worked out without at all interfering with the plaintiff's ditch or flume, and also that defendant's claim is valueless for mining purposes. This was denied us, (T., p. 13, folio

28,) and I think properly, and only refer to the matter to show that we do not put the plaintiff's rights upon any such ground, but upon this: that he has the right he claims absolutely, and that it makes no difference whether in the exercise of the right the defendant's claim proper is injured or not, or has value or no value, for damages cover such injuries. And we refer to it also for a more specific reason, and that is, that this court will distinguish the difference which we claim exists between the defendant's *mining claim* as such and his *ditch and water rights;* and our point in this demarcation is, that the one is answered in *damages*, and the other *by the law of easements;* that is, that as to injuries to his mining claim proper, the case stands as if the defendant had no ditch; and that as to his ditch and water rights, the case stands as if the defendant had no mining claim.

Finally, we submit that our interpretation of the law is fair; it reconciles the sections, protects the rights of both the parties, and no harm can result from it to either. On the contrary, to hold that our property, useful in its character and expensive in its structure, may be destroyed at the pleasure of the defendant is, to us, a monstrous doctrine.

Should we be sustained in our views, and a new trial had, exact justice may be done the parties by decree of the court fixing definitely their rights.

All of which is respectfully submitted.

B. F. MYRES,
For Plaintiff in Error.